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In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WINTHROP A. ROCKWELL
JOHN P. BORGER
JAMES A. O'NEAL
BRUCE JONES
JOHN P. MANDLER
Faegre & Benson LLP
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
CHARLES ROTHFELD
EVAN M. TAGER
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

As the United States has stated in another case pending before this Court, "FIFRA preempts state-law causes of action * * * that would require a registrant who has received EPA approval of its label under FIFRA to change that label to avoid future liability." *Bates* v. *Dow Agrosciences LLC*, Br. for the United States as Amicus Curiae, 2004 WL 1205202, at **14-15 (May 28, 2004) (No. 03-388). It is undisputed that if BASF had labeled Poast Plus differently – either by treating it as identical to Poast or by labeling it for use on minor crops – it would have faced no state-law liability under respondents' theory. It also is undisputed that BASF's current labeling of Poast Plus was approved by EPA and complied fully with FIFRA's requirements. Because respondents cannot obscure these fundamental points, there can be no doubt that their consumer fraud action is preempted.

Nevertheless, the Minnesota Supreme Court has ruled that jurors presented with consumer fraud claims may second-guess EPA's pesticide labeling regulations and impose treble damages for labeling that they consider "unconscionable." See Opp. 3. The Minnesota courts also have created an exception to the First Amendment for consumer fraud claims even when those claims challenge truthful speech on issues of public importance. Because the brief in opposition both verifies BASF's characterization of the case and acknowledges the sweeping nature of the decisions below, it confirms that this matter merits review by this Court.

I. RESPONDENTS CONCEDE THAT THEIR LAWSUIT ATTACKED BASF'S PESTICIDE LABELS AND ITS PROTECTED SPEECH

Respondents devote much of their brief to a distorted rendition of the facts that is meant to portray BASF as an unscrupulous corporation. See Opp. 1-20. Stripped of unsup-

ported accusations and distracting rhetoric, however, the brief in opposition confirms in all essential respects the petition's description of this case. The parties agree that (1) respondents' action was an attack on BASF's FIFRA-compliant labeling of its pesticides; and (2) their claims relied heavily on allegations that BASF's protected speech violated state law.

First, respondents concede that their case turns entirely on the premise that "Poast and Poast Plus are the same herbicide" (Opp. 9), fraudulently labeled as different products. Respondents' assertion that the two pesticides are "the same" self-evidently rests on nothing more than the undisputed facts – explained fully in the petition – that (1) the two pesticides had the same *active* ingredient, and (2), at BASF's request, EPA registered the two pesticides for the same crops using the same residue testing data. But respondents do not deny that Poast Plus contained a newly-invented, patented additive, not present in Poast, which made the sethoxydim in the product more biologically active ("hotter") and therefore made Poast Plus more dangerous for minor crops than Poast. Tr. 2736-2743, 2921. Respondents also do not deny that, because of the two pesticides' different formulations, EPA's regulations *required* BASF to label Poast and Poast Plus as two distinct products. See Pet. 4.

Respondents' claim that BASF engaged in "price-gouging" (Opp. 19) also directly challenges the differential labeling mandated by FIFRA. Respondents testified uniformly that Poast was an excellent product that *increased* their profits by increasing crop yields. Tr. 593, 1301, 2200. Nonetheless, they argue that BASF "exploited" them by failing to label and market Poast Plus – which for a time was priced competitively to capture a share of the soybean market – as if Poast Plus were identical to Poast. See Opp. 2 ("BASF engaged in a national 'system of deceit' * * * by marketing *the same herbicide as different products* * * * to extract in-

flated prices from minor crop farmers.") (emphasis added); see also *id.* at 10-11.

But the two pesticides are *not* "the same" (Opp. 9): as its name suggests, Poast *Plus* contains an additional ingredient that was extensively tested for use on soybeans but not minor crops. BASF was complying with FIFRA – as well as sensible industry practice – in giving its two products distinct names and labels. And BASF did nothing wrong in "exploiting" the market potential of Poast – a fully tested pesticide with a long record of excellent results in the underserved minor crop market.

Second, respondents acknowledge that the *other* facet of the so-called "fraudulent marketing scheme[]" (Opp. 3) was BASF's decision to omit minor crops from the Poast Plus labels and to market the product consistently with those labels. See, *e.g.*, Opp. 12 (discussing "BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops"). But they concede (Opp. 21) that EPA's subset-labeling rule (40 C.F.R. § 152.130(b)) *expressly authorized* the omission of certain EPA-registered uses from the product labeling. And they simply ignore the crucial fact that *no State ever registered Poast Plus for use on minor crops.*

Thus, respondents cannot deny that it would have been *illegal* for BASF to label or advertise Poast Plus for minor crops, and that it would have been *illegal* for any farmer (except for farmers in North or South Dakota during the one-year special local needs registration period) to use Poast Plus on minor crops. See Pet. App. 74a. The fact that no State ever registered Poast Plus for minor crops also means that BASF's allegedly deceptive promotional statements (*e.g.*, that Poast was the "only postemergence herbicide registered for use in flax" (Opp. 12)) were entirely *true*.

Although they otherwise turn a blind eye to the parallel role that the States play in the registration of pesticides, respondents assert repeatedly that BASF deceived state regula-

tors regarding the breadth of the EPA registration of Poast Plus. See, *e.g.*, Opp. 15-18. These allegations, which concern a short-lived misunderstanding between BASF and North Dakota officials in 1994, have no relevance here. A BASF employee informed North Dakota's new Commissioner of Agriculture, Sarah Vogel, that the company would have to conduct substantial additional testing in order to label Poast Plus for minor crops. Tr. 1745, 1809-1811. Although there is confusion in the record about what kind of testing the BASF employee said was needed (see P. Ex. 73), the statement was true: although *residue* testing had been completed, BASF believed that more target-area phytotoxicity and tank-mix testing would be needed before it could market Poast Plus for minor crops. Tr. 2920-2923, 2946. Vogel nonetheless believed that BASF had not been candid when she learned from EPA a few weeks later that Poast Plus had already been federally registered for minor crops. Tr. 1752.[1]

This misunderstanding had no impact at all on respondents, who knew nothing of the communications and did not purchase Poast Plus in North Dakota for use there. More importantly, Vogel soon learned that EPA fully supported the right of product registrants to omit registered uses from their labels – specifically including BASF's right to omit minor crops from the Poast Plus label. Over Vogel's objections, EPA required her to enforce FIFRA's prohibition against the off-label use of Poast Plus on sugar beets, despite the fact

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[1] It is in *this* context that EPA informed North Dakota officials that the exclusion of sugar beets from the Poast Plus labeling "related to a marketing strategy and is not a regulatory matter." Opp. 17 (quoting P. Ex. 334). That comment meant only that EPA regulations were not *preventing* BASF from labeling Poast Plus for minor crops. The fact remains that an EPA regulation expressly *permitted* BASF to omit minor crops from the Poast Plus label – as EPA made clear to Vogel. See D. Ex. 559 ("If a company chooses to not support crops on its label, that's its choice").

that EPA had registered Poast Plus for sugar beets. D. Ex. 636. As Vogel stated, she was told by EPA that, regardless of any difference in price, "[w]e have no choice but to enforce the law." Tr. 1803 (quoting D. Ex. 559). Respondents, however, have now managed to obtain from the Minnesota courts what Commissioner Vogel could not obtain from EPA: a ruling that farmers were entitled to use Poast Plus for all of its registered uses, despite the federally-approved labeling limiting farmers to a subset of such uses.

Finally, respondents confirm that their case relied heavily on characterizing BASF's protected speech activities as unconscionable business practices. See Opp. 14 ("BASF urged that farmers be criminally prosecuted for 'off-label' use of cheaper Poast Plus on minor crops"); *id.* at 15 ("BASF used its public relations firm to ghostwrite an Article disseminated nationally, warning of the risks of 'off-label' use while concealing the fact that the article was paid for by BASF"). Respondents impugn BASF's motives, but they cannot deny that the magazine article's description of the regulatory regime was entirely accurate. Nor do they deny that BASF's communications with regulatory officials regarding the possible off-label use of Poast Plus resulted in successful prosecutions of farmers and dealers that continued, at EPA's insistence, long after state officials were fully aware of the scope of the EPA registration for that pesticide.

II. RESPONDENTS' NARROW UNDERSTANDING OF FIFRA'S PREEMPTIVE EFFECT IS WRONG

Respondents contend that FIFRA's express prohibition of state labeling requirements does not apply to state-law consumer fraud claims. See Opp. 21. Such a broad exception to federal preemption is indeed a necessary consequence of the decision below. If the decision stands, then consumer class actions brought in Minnesota henceforth will assume a conclusive role in determining the content of pesticide labeling. Contrary to respondents' arguments, however, the decision is

flatly at odds with the construction of FIFRA's express preemption provision that has been adopted by other courts.

Respondents acknowledge (Opp. 24-26) the large body of case law holding that FIFRA expressly preempts *any* damages action – including consumer fraud actions – arising from an alleged omission or misstatement on a pesticide label. They attempt to distinguish these rulings (*id.*) on the ground that they concern different *subject matter* (failure-to-warn, phytotoxicity, and fraud on the EPA). But they offer no textual or other reason why FIFRA would preempt, for example, a claim that a pesticide's label failed sufficiently to warn of risks to crops – an issue that the Court will address this Term in *Bates* v. *Dow Agrosociences LLC*, No. 03-388 – but would not preempt a claim that it was unconscionable for a manufacture to omit certain crops from the list of approved uses on a pesticide's label. If anything, respondents' claims strike more directly at the heart of EPA's labeling regime, because an EPA regulation *expressly allows* the omission of which respondents complain.

Respondents contend (Opp. 22) that EPA "does *not* address company marketing * * * practices." They support that assertion only with Commissioner Vogel's statement conveying an EPA official's remark that the omission of minor crops from the Poast Plus label was "related to a marketing strategy and is not a regulatory matter." P. Ex. 334. As explained above (at note 1), this meant only that EPA already had authorized BASF to add minor crops to the Poast Plus label – a fact that is not in dispute.

It is also undisputed, however, that EPA's subset labeling rule gave BASF the option of *excluding* minor crops from the labeling. See Opp. 21. EPA promulgated that rule to ensure that EPA's registration of a pesticide for a particular use did not create an obligation to market the pesticide for that use. See CropLife America Am. Br., at 9-11. Indeed, EPA insisted that North Dakota regulators respect the labeling flexi-

bility that FIFRA afforded to BASF and prosecute off-label use of Poast Plus by minor-crop farmers despite its knowledge that BASF was charging less for the pesticide with the more restrictive label. See D. Ex. 636; Tr. 1803-1805. Because federal law gave BASF the option of excluding minor crops from the Poast Plus label, respondents' claim that this labeling decision entitled them to treble damages is preempted – both expressly by Section 136v(b) of FIFRA and under principles of conflict preemption. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-882 (2000).

Respondents also contend that "FIFRA does not grant the EPA authority over advertising of pesticides." Opp. 21. The Federal Register notice that respondents cite for that proposition says just the opposite. In that publication, EPA promulgated its regulation prohibiting advertisement of unregistered pesticides or uses (40 C.F.R. § 168.22) and stated that its authority under FIFRA extends to all "claims in advertising that are made 'to induce the * * * sale and use' of a pesticide and that therefore are part of the distribution or sale of the pesticide." 54 Fed. Reg. 1122, 1124 (1989).

Although EPA's authority over pesticide *advertising* is not "plenary" (*id.*), its authority over pesticide *labeling* is made exclusive by 7 U.S.C. § 136v(b). Appellate courts thus generally agree that FIFRA preempts state-law challenges to advertisements that "are premised ultimately upon the inadequacy of product label[ing]." *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); see also, *e.g.*, *Kuiper* v. *Am. Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993); Product Liability Advisory Council Am. Br. at 8-10. Here, all of the alleged flaws in BASF's advertisements were rooted in the asserted defects in BASF's labeling. The advertisements (like the labeling) distinguished between Poast and Poast Plus, and the advertisements (like the labeling) indicated to farmers that they could not lawfully use Poast Plus on minor crops.

BASF could not have addressed respondents' concerns about the advertisements without also changing its labeling.[2]

"[T]he plain terms of Section 136(v)(b) * * * prohibit a State from imposing '*any* requirements' that are 'in addition to or different from' the FIFRA requirements." *Bates*, Br. for the United States as Amicus Curiae, 2004 WL 1205202, at *13 (emphasis added). The Minnesota Supreme Court's ruling, however, superimposes 50 states' consumer fraud laws on FIFRA's labeling regime. This case plainly merits review alongside *Bates*, with expedited briefing if necessary to allow coordinated argument.

III. THE FIRST AMENDMENT RULING MERITS REVIEW

Respondents' over-caffeinated rhetoric cannot obscure the significant First Amendment implications of the decision below. As BASF showed in the petition (at 23-24), respondents acknowledged before the jury that the statements in *Sugarbeet Grower* magazine upon which they premised liability presented "good information." BASF's reports to state authorities regarding possible off-label use of Poast Plus likewise were entirely accurate; it is undisputed that North Dakota authorities continued successful enforcement actions in response to those reports even after learning that the EPA had registered Poast Plus for use on minor crops.[3] Respon-

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[2] Respondents rely on the testimony of lay witnesses who agreed with respondents' counsel that a company can comply with FIFRA and "still commit consumer fraud." Opp. 23-24. Such improperly broad questions and their ambiguous answers may have had an impact on the jury, but they shed no light on whether FIFRA preempts a state consumer fraud action claiming that labeling practices sanctioned by federal law nonetheless are unconscionable under state law.

[3] Respondents quote Vogel's testimony that BASF turned in farmers "for doing things that were in fact legal and that the company knew all along was legal." Opp. 28. That inaccurate testimony re-

dents offer no response to these points. In addition, as BASF also showed in the petition (at 24-27), the Minnesota court's *actual holding* was that the First Amendment does not shield the truthful statements at issue here because this case does not raise issues of defamation, libel, or prior restraint. Respondents make no effort to defend this ruling or to respond to our argument that the ruling constitutes a shocking departure from this Court's precedents.

Instead, respondents insist, in highly conclusory terms, that BASF's statements receive no constitutional protection because this case is one alleging "consumer fraud." Opp. 26-27. The statements on which the courts below premised liability, however, were truthful ones concerning subjects that respondents themselves acknowledged to be "significant matters of public concern." Pet. 23. As BASF showed in the petition (at 24-27), such statements cannot be stripped of First Amendment protection "[s]imply [by] labeling an action one for 'fraud.'" *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003). Again, respondents make no response to this point.

The holding below inevitably will chill truthful, socially valuable speech in ways that concerned a majority of the Court in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003). See U.S. Chamber of Commerce Am. Br., at 18-20. In arguing to the

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flects nothing more than Vogel's admitted objections to the federal scheme, which permitted manufacturers to obtain broad "shelf registrations" from EPA but to include fewer crops on the product label. Tr. 1795-1797. As Vogel acknowledged, she became fully aware that the use of Poast Plus on minor crops was unlawful when EPA refused North Dakota's request for an enforcement waiver. Tr. 1806. As she explained at trial, "That's why we did the 24(c)" special local needs registration, which for one year only made it lawful for North Dakota farmers to use Poast Plus for minor crops if they signed an assumption of risk liability waiver. Tr. 1791.

contrary, respondents observe only that the suit in *Nike* was brought by an "ideological plaintiff" who had suffered no direct harm, while the interest of respondents here is purely mercenary. Opp. 29. But respondents do *not* deny that the state consumer fraud statute at issue here (as well as many similar statutes in other states) shares the most troubling characteristics of the California law applied in *Nike*: as we showed in the petition (at 27-28), state law allows a jury to punish speech whenever it finds that the challenged statement was "unconscionable" because inconsistent with a "broad business ethic," even when – as is true in this case – there was no showing that the plaintiff relied on (or was aware of) the statement, and even when there was no showing of any intent to deceive on the part of the speaker.

Given the broad reach of the holding below – which one Minnesota appellate judge called "the poster child for national class action reform" (Pet. App. 56a) – it is impossible for a commercial speaker anywhere in the country to have confidence that its *truthful* statements will not give rise to potentially enormous liability. For example, so long as a given jury has an especially severe view of proper "business ethics," an organic farmer could be found liable to growers of conventional agricultural products for opining on the hazards of pesticides; or a candy maker could be called to account by a cigarette company for outlining the health advantages of chewing gum rather than smoking tobacco; or a maker of electric cars could be haled into court for criticizing internal combustion engines. Because such claims would be no more far-fetched than the ones advanced in this case, it is inevitable that the holding below will discourage speech in ways that are deeply troubling and wholly inconsistent with the First Amendment. Review by this Court accordingly is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WINTHROP A. ROCKWELL
JOHN P. BORGER
JAMES A. O'NEAL
BRUCE JONES
JOHN P. MANDLER
Faegre & Benson LLP
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

STEPHEN M. SHAPIRO
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KENNETH S. GELLER
CHARLES ROTHFELD
EVAN M. TAGER
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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